Supreme Court, U.S.
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No. 99-312

In The

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

DEDRA SHANKLIN, Individually and as Next Friend of Jessie Guy Shanklin,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals properly applied this Court's decision in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), when it held that claims of negligence based on inadequate warning devices installed at a rail-highway grade crossing are not preempted solely because the warning devices at the crossing were paid for with federal funds.

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BRIEF IN OPPOSITION

Respondent Dedra Shanklin, the widow of Eddie Shanklin who was killed at the unprotected rail grade highway crossing in Tennessee asks this Court to deny the Petition. Under the specific facts of this case, the decision by the Sixth Circuit does not conflict with *Easterwood* or the decisions in other courts and because the petitioner's liability hinges only in small part on the matters claimed to be preempted this case is a poor vehicle for deciding any unresolved post-*Easterwood* preemption questions.

STATEMENT OF THE CASE

Petitioner Norfolk Southern Railway Company ("Norfolk Southern") maintains that this Court held in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), that mere federal spending for the installation of warning devices at rail-highway grade crossings preempts all state tort claims that the devices installed are inadequate. Pet. at 2. Respondent Dedra Shanklin, the widow of Eddie Shanklin who was killed by a Norfolk Southern train at a crossing in Tennessee, disagrees with the petitioner's description of the *Easterwood* holding.

The appellate court here, relying on Judge Posner's opinion in *Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994), ruled that *Easterwood* should not be interpreted as Norfolk Southern suggests. According to the court,

> the preemption analysis begins, but does not end, with the federal funding issue . . . [T]he

> *Easterwood* Court never got around to enumerating additional requirements for preemption, because the threshold requirement, federal funding, was absent in that case. Judge Posner correctly noted in the *Shots* opinion there is a difference in holding that federal funding is a necessary condition to preemption and holding that federal funding is a sufficient condition.

Pet. App. 10a.

The Seventh Circuit in *Shots* and the Sixth Circuit here refused to accept the legal fiction that federal funding is equivalent to a federal determination that the devices being funded provide adequate protection for motorists at a particular crossing. Both circuits concluded that federal preemption of state law should be limited to only those instances where federal regulatory authority has actually been exercised. *See Shots*, 38 F.3d at 309 and *Shanklin* at Pet. App. 13a. This approach advances the goals in the Federal Railroad Safety Act of 1970 ("AFRSA"), Pub. L. No. 91-458, 84 Stat. 971, of promoting railroad safety by requiring that the warning devices paid for with federal funds be installed in compliance with the federal regulatory scheme without interfering with the states' historic powers to regulate matters of health and safety.

1. Statutory and Regulatory Background.

The relationship between 23 C.F.R. § 646.214(b)(3) and (b)(4), the federal regulations that govern the process for selecting the devices that the Secretary of Transportation ("Secretary") has determined are necessary to provide an adequate warning to motorists at a particular

crossing, is at the heart of this case. Section 646.214(b) provides, in pertinent part,

> (3)(i) *Adequate warning devices* . . . on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:
>
> (A) Multiple main line railroad tracks.
>
> (B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.
>
> (C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.
>
> (D) A combination of high speeds and moderately high volumes of highway and railroad traffic.
>
> (E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.
>
> (F) A diagnostic team recommends them.[1]
>
> (ii) In individual cases where a diagnostic team justifies that gates are not appropriate,

[1] For definition of "diagnostic team," see 23 C.F.R. § 646.204(g) (1992).

> FHWA may find that the above requirements are not applicable.
>
> (4) For crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA.

In general, the flashing lights and gates required under (b)(3) are called active devices and the crossbucks allowed by (b)(4) are called passive devices.

2. Statement of Facts.

Shanklin relies on the statement of facts in the decision of the Sixth Circuit, Pet. App. 2a-5a, and in particular notes the following. In 1987, the Tennessee Department of Transportation ("TDOT") installed reflectorized crossbucks at the Oakwood Church Road Crossing, where the accident occurred, as part of a "mop-up" detail under the "minimum protection" program that included the installation of passive warning devices at 196 crossings in 11 West Tennessee counties. The improvements were undertaken to bring the crossing into compliance with 23 C.F.R. § 130(d), which mandates that a state establish a schedule of crossing safety projects and that "[a]t a minimum such schedule shall provide signs for all railway-highway crossings." Pet. App. at 3a.

Because the upgrade was not done under the state's "priority program," no diagnostic team examined the Oakwood Church Road Crossing to determine what warning devices were necessary to provide an adequate

warning to motorists. Pet. App. 35a-36a. There was no oversight by the federal government which "merely funded, funneled and signed off on this project." C.A. App. 322-23. As Petitioner admits, the Oakwood Church Road Crossing was not even one of the few crossings of the 196 crossings under this contract viewed in the random drive-by conducted by an FHWA employee. Pet. at 9-10.

Contrary to the Petitioner's assertion that the Oakwood Church Road Crossing is governed by section (b)(4), the District Court noted,

> [T]he record in this case shows that at least some of the (b)(3) conditions appear to exist at the Oakwood Church Road Crossing. These conditions include high speed train operations combined with limited sight distance, moderately high railroad and highway traffic, trucks carrying hazardous materials, and a prior collision at the crossing.

Pet. at 14; Pet. App. 3a, 35a-36a.

The Sixth Circuit was also mindful that a diagnostic team did not evaluate whether active warning devices should have been installed at the Oakwood Church Road Crossing. Pet. App. 13a, 19a. According to the court, "[I]t makes no sense to find that the railroad has been excused from its common law duty to maintain safe crossings simply because without any analysis by anyone regarding what devices are required at [the particular crossing] under the federal regulatory scheme, FHWA signed off on a request for funds." Pet. App. 13a-14a. The appellate court concluded that either subsection (b)(3) was applicable, in which case active warnings are required, or it was

not applicable, in which case FHWA approval of the type of devices to be installed was required under (b)(4).

In addition to her inadequate warning device claim, Shanklin also alleged that Norfolk Southern was negligent under Tennessee law for failing to give adequate sound warning by the locomotive horn, to apply the brakes, and to remove vegetation from the area surrounding the crossing. The Sixth Circuit noted that "there was extensive expert testimony that the limited sight distance caused by vegetation, terrain, and the proximity of a house created a "trap" which made it impossible for Shanklin to see the train in time to avoid the collision." Pet. App 23a. Moreover, experts also testified that the train's headlamp was inadequate because it pointed straight down the track, rather than at an angle, and that Eddie Shanklin could not have heard the train's horn. Pet. App. 23a-24a. The jury returned a general verdict; Norfolk Southern did not ask for any special verdict form or interrogatory that would have reflected which of Shanklin's claims provided the basis for its decision.

REASONS FOR DENYING THE WRIT

A. UNDER THE SPECIFIC FACTS OF THIS CASE, THE DECISION BY THE SIXTH CIRCUIT DOES NOT CONFLICT WITH *EASTERWOOD* OR THE DECISIONS IN OTHER COURTS.

The Sixth Circuit decision is consistent, not only with federal regulations and *Easterwood*, but also with the decisions of the other circuits and the state supreme courts. In that regard, in *Easterwood*, this Court stated, "States **must**

employ automatic gates with flashing light signals as part of any improvement project that concerns a crossing that features, *inter alia*, multiple tracks, high speed trains operating in areas of limited visibility, heavy vehicle or train traffic, or if a diagnostic team made up of 'representatives of the parties of interest in [the crossing], § 646.204(g), recommends them." *Easterwood*, 507 U.S. at 666 (emphasis added). Not a single court – with the exception of the Eighth Circuit in *Bock v. St. Louis Southwestern Ry. Co.*, 181 F.3d 920 (8th Cir. 1999) (cert. petition is expected to be filed within the month) – has held that the installation of passive warning devices (i.e. crossbucks), paid for with federal funds at a crossing that has the conditions described in section (b)(3) where no diagnostic team has justified the absence of automatic gates, preempts state inadequate warning device claims. Instead, the rulings of courts of appeal and state supreme courts relied upon by the petitioner noted that no (b)(3) conditions existed at the crossing at issue or refused to consider the presence of (b)(3) conditions.[2]

[2] See, e.g., *Hester v. CSX Transportation, Inc.*, 61 F.3d 382, 386 FN 6 (5th Cir. 1995), where the Fifth Circuit stated, "Of course passive warning devices are not adequate where section 646.214 (b)(3) applies, but it seems clear on the facts before us that the applicable provision is section 646.214 (b)(4)." *Bryan v. Norfolk and Western Ry. Co.*, 154 F.3d 899, 903-04 (8th Cir. 1998); *Elrod v. Burlington N. RR. Co.*, 68 F.3d 241, 243 FN 5 (8th Cir. 1995); *Armijo v. Atchison, Topeka and Santa Fe Ry. Co.*, 87 F.3d 1188, 1190 (10th Cir. 1996); *Ingram v. CSX Transp., Inc.*, 146 F.3d 858, 865 (11th Cir. 1998); *Union Pacific v. Sharp*, 952 S.W.2d 658, 665 (Ark. 1997); and *Lubben v. Chicago Central & Pac. R.R. Co.*, 563 N.W.2d 596, 598 (Iowa 1997), there was no question but that (b)(4) crossing devices were appropriate.

In *Bock*, the Eighth Circuit referred to *Elrod* in holding that "once a federally funded warning device is installed and operational – the crossbucks in this case – preemption occurs," 181 F.3d at 923, but the facts in *Bock* are quite different from those in *Elrod*. In *Elrod* there was no question but that the crossing was a (b)(4) crossing requiring a passive sign only, and therefore, *Elrod* concerned an issue *not* presently before this Court. Moreover, *Bock* involved a crossing that had been designated a (b)(3) crossing, but the accident in that case occurred before a gate with flashing lights was installed. The court in *Bock*, held that the earlier installation of crossbucks with federal funds barred the plaintiff's claim despite the fact that a diagnostic team had, at a later time, diagnosed the crossing as a (b)(3) crossing requiring active warning devices and ordered them to be installed. At the time of Elmer Bock's death the warning devices had not yet been installed.

As we explain below, if this Court is to grant certiorari on the (b)(3) issue, *Bock* is the appropriate case for review.

B. THIS CASE IS A POOR VEHICLE FOR DECIDING ANY UNRESOLVED POST-*EASTERWOOD* PREEMPTION QUESTIONS BECAUSE THE PETITIONER'S LIABILITY HINGES ONLY IN SMALL PART ON THE MATTERS CLAIMED TO BE PREEMPTED.

Petitioner's characterization of the preemption issue as a "principal issue" at trial and on appeal is inaccurate. Although the issue was argued in pre-trial motions, bench conferences and the appellate briefs, the jury heard

little beyond Norfolk Southern's assertion that the responsibility for signalization rested with the government. Norfolk Southern did not request a special verdict form to allow the jury to explain the basis for the decision. The Sixth Circuit rejected Norfolk Southern's claim that there was no other evidence on which a reasonable jury could base its verdict. Pet. App. 24a. For the above reasons, the result in this case cannot be changed by this Court's grant of further review.

Moreover, a petition for certiorari review is expected to be filed in *Bock*, and the Eighth Circuit's decision in that case would provide a better vehicle to address the question of whether claims of negligence based on inadequate warning devices at a railway grade crossing are preempted because the devices were paid for with federal funds. *Bock* was decided on a motion for summary judgment that addressed the preemption issue only; whereas here, the jury may have based its decision on any one of several negligence claims unrelated to the inadequate warning devices claim.

CONCLUSION

Norfolk Southern's petition for certiorari should be denied.

Respectively submitted,

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